STATE OF MICHIGAN

COURT OF APPEALS

HARLEYSVILLE LAKE STATES INSURANCE COMPANY,

Plaintiff-Appellant,

v

KEITH G. KANGAS,

Defendant-Appellee.

UNPUBLISHED
April 21, 2009

No. 282500
Genesee Circuit Court
LC No. 07-085919-CK

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Plaintiff Harleysville Lake States Insurance Company appeals as of right from a circuit court order denying its motion to vacate an arbitration award and granting defendant's motion to confirm the award. We affirm.

Defendant was driving his employer's vehicle on US-23 when another driver struck a truck tire that was lying on the road, causing her to lose control of her vehicle and strike defendant's vehicle, which in turn caused defendant's vehicle to go off the road and roll over. Defendant filed an action against the driver of the other vehicle, and filed a separate claim for uninsured motorist benefits with plaintiff, the insurer of defendant's truck, based on the involvement of the truck tire. Plaintiff disputed that the facts established the involvement of an uninsured vehicle as defined by the policy. The parties agreed to submit their dispute to arbitration, as permitted by the insurance policy. The arbitrators awarded defendant $500,000, less a set off of $275,000 for the amount defendant recovered from the other driver involved in the accident, resulting in a net award of $225,000.

Plaintiff then filed a complaint in circuit court to vacate the arbitration award arguing that the arbitrators committed an error of law by ruling that the insurance policy provided coverage under these facts. Defendant filed a motion to confirm the arbitration award. The circuit court held that because the arbitration proceeding involved common-law arbitration, not statutory

arbitration,[1] it was without authority to review the arbitration award for an error of law and, accordingly, confirmed the award.

Plaintiff raises two issues on appeal: 1) that the circuit court erred in concluding it could not review a common law arbitration award for an error of law; and 2) that the circuit court erred in dismissing its motion to vacate the award because the arbitrators committed an error of law in awarding benefits to defendant. Although we agree with plaintiff that the circuit court erred in concluding it could not review the arbitration award, we affirm the circuit court because we conclude that the court reached the right result in confirming the award, albeit for the wrong reason. *Shember v Univ of Mich Medical Ctr*, 280 Mich App 309, 329; ___ NW2d ___ (2008).

Determination of the standard applicable to review of an arbitration decision is a question of law, which is reviewed de novo. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

> Common-law arbitration is not subject to as strict a standard of review as is statutory arbitration. *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992), citing *Auto-Owners Ins Co v Kwaiser*, 191 Mich App 482, 486; 476 NW2d 467 (1991). Rather, judicial review of a common-law arbitration award is limited to instances of bad faith, fraud, misconduct, or manifest mistake, *Emmons, supra* at 466, and an award will be upheld absent "'(1) fraud on the part of the arbitrator; (2) fraud or misconduct of the parties affecting the result; (3) gross unfairness in the conduct of the proceeding; (4) want of jurisdiction in the arbitrator; (5) violation of public policy; [or] (6) want of the entirety in the award,'" *EE Tripp Excavating Contractor, Inc v Jackson Co*, 60 Mich App 221, 250; 230 NW2d 556 (1975), quoting *Frazier v Ford Motor Co*, 364 Mich 648, 655; 112 NW2d 80 (1961). [*City of Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006).]

Our Supreme Court has also concluded that, with respect to both statutory and common-law arbitration, a court may properly review an arbitration award for an error of law where that error "clearly appears on the face of the award." *DAIIE v Gavin*, 416 Mich 407, 441, 443; 331 NW2d 418 (1982). Accordingly, the circuit court erred when it concluded that because the arbitration award resulted from a common-law, rather than a statutory, arbitration, it was precluded from making a determination as to whether the arbitrators had made an error of law.

Plaintiff next argues that the circuit court erred in not vacating the arbitration award because the arbitrators made an error of law. We disagree.

"The character or seriousness of an error of law which will invite judicial action to vacate an arbitration award . . . must be error so material or so substantial as to have governed the

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[1] The parties do not dispute that they did not have an arbitration agreement that complies with MCL 600.5001 and, therefore, they agreed to only common-law arbitration. See *Wold Architects & Engineers v Strat*, 474 Mich 223, 231; 713 NW2d 750 (2006).

award, and but for which the award would have been substantially otherwise." *Id.* at 443. This is because:

> Arbitration, by its very nature, restricts meaningful legal review in the traditional sense. As a general observation, courts will be reluctant to modify or vacate an award because of the difficulty or impossibility, without speculation, of determining what caused an arbitrator to rule as he did. The informal and sometimes unorthodox procedures of the arbitration hearings, combined with the absence of a verbatim record and formal findings of fact and conclusions of law, make it virtually impossible to discern the mental path leading to an award. Reviewing courts are usually left without a plainly recognizable basis for finding substantial legal error. It is only the kind of legal error that is evidence without scrutiny of intermediate mental indicia which remains reviewable[.] . . . In many cases the arbitrator's alleged error will be as equally attributable to alleged "unwarranted" factfinding as to asserted "error of law." In such cases the award should be upheld since the alleged error of law cannot be shown with the requisite certainty to have been the essential basis for the challenged award and the arbitrator's findings of fact are unreviewable. [*Id.* at 429.]

The award in the present case reads simply: "The panel, having considered the evidence, finds in favor of the plaintiff in the amount of $500,000.00 plus interest in the amount of $ zero less $275,000 or a net amount of $225,000.00." It is difficult to see anything on the face of the award that would constitute an error of law. Plaintiff argues that there is no coverage for the accident under the plain terms of the policy such that any award to defendant constituted an error of law. The problem with this argument is that the claim that there is no coverage under the policy is dependent upon the facts on which the arbitrators relied for their decision. As one arbitrator on the panel noted, the question of whether benefits were due under the policy was a "quasi-legal, quasi-factual" issue. Mixed questions of law and fact are within the province of the arbitrator's sole discretion. *DAIIE, supra* at 429.

Additionally, although counsel for plaintiff indicated that he was specifically "reserving the right" to take the issue of "how the set-off works" to court, he agreed that "[t]he rest [of the factual and legal issues] are being submitted to this panel." He also explicitly indicated to the panel that the issue submitted to the panel was "whether the requisites are met for [uninsured motorist] coverage." Had plaintiff truly not wished to arbitrate this issue, it could have unilaterally revoked the arbitration provision and proceeded before the circuit court with a declaratory judgment action on the question of whether there was coverage under the terms of the policy. See *Wold Architects & Engineers v Strat*, 474 Mich 223, 236-237; 713 NW2d 750 (2006). Instead, plaintiff chose to roll the dice with the arbitration panel.

"Consistent with the rule of finality, an arbitration agreement, whether common-law or statutory, is a contract by which the parties forego their rights to proceed in a civil court in lieu of submitting their dispute to a panel of arbitrators." *City of Ferndale, supra* at 461 (internal quotations, edits and citations omitted). Having voluntarily submitted the question of whether there was coverage under the policy to the arbitration panel, plaintiff is not entitled to additional bites at the apple by asking, first the circuit court, and now this Court, to reconsider whether the facts of this case support the decision of the arbitrators by couching its argument as one of whether the arbitrators made an error of law. "Litigants must be required to select only one

dispute resolution process." *Fromm v Meemic Ins Co*, 264 Mich App 302, 306, n 1; 690 NW2d 528 (2004).

We decline to evaluate the merits of plaintiff's claim regarding the language of the contract because to do so would only encourage future parties to submit certain types of questions to arbitration panels while retaining an appellate parachute in the event they receive an adverse arbitration decision. This would gut arbitration of all utility and is precisely the reason that judicial review of arbitration awards is limited. Indeed, statements by plaintiff's counsel indicate plaintiff intended to harbor this issue as a kind of appellate parachute. As the arbitrators were attempting to get a handle on what issues were before them, plaintiff's counsel kept talking about "coverage" issues and the arbitrators attempted to determine whether this meant that plaintiff intended to be able to appeal their decision because the policy prevented coverage issues from being arbitrated. Plaintiff's counsel then stated: "So, you know, if this panel reaches a compromise or if it's a decision even if I disagree with it or another court disagrees with it, if it's satisfactory, you know, I'm not saying anyone is going to appeal . . . ." Thus, so long as the arbitrators did not award defendant too much, plaintiff indicated it had no intention of appealing. Apparently, the arbitrator's verdict was not "satisfactory," so plaintiff decided to appeal.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro